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Winnipeg, Manitoba

Forensic Evidence Review Committee



Final Report

Submitted to:
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Deputy Attorney General
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Manitoba 

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Background and Terms of Reference for the Committee

Background

On April 23, 2003, the Deputy Minister and Deputy Attorney General for the Province of Manitoba, Mr. Bruce A. MacFarlane, Q.C., announced the establishment of an advisory committee whose goal it was to review homicide cases from the previous fifteen (15) years in Manitoba in which hair comparison evidence was relied upon to secure a conviction. The overarching goal of this initiative was to actively seek out any possible miscarriages of justice that may have resulted from a reliance on hair comparison evidence. It was decided that the Committee would be composed of six (6) members from the Manitoba Department of Justice, the Defence Bar, Manitoba police and an independent scientific expert.

Prior to the introduction of DNA testing for forensic purposes in Canada in the mid-1990's, microscopic hair comparison was used to assess forensic evidence. While microscopic hair comparisons can give valuable evidence in many instances, DNA tests are far more reliable when the question is whether or not a suspect can be excluded as a source of a hair sample.

The following Terms of Reference for the Committee were established:

Terms of Reference

The Deputy Attorney General of Manitoba, Bruce A. MacFarlane, Q.C., has established an advisory committee to examine criminal cases prosecuted in Manitoba where the Crown relied upon certain types of forensic evidence.

Composition of the Advisory Committee

The Committee shall consist of the Assistant Deputy Attorney General as Chair; a Senior Crown Attorney; a lawyer in the private sector in Manitoba designated by the Association in Defence of the Wrongfully Convicted; a representative from each of the Royal Canadian Mounted Police and the Winnipeg Police Service; and a forensic expert unconnected with any law enforcement agency, designated by the Deputy Attorney General after consultation with the other members of the Committee. Other persons with expertise may be consulted by the Committee from time to time, through the Chair.

Objectives of the Advisory Committee

The Committee shall examine all cases of culpable homicide:

- prosecuted in Manitoba during the past fifteen (15) years;*
- in which the Crown tendered and relied upon microscopic hair comparison evidence;*
- where the accused pleaded not guilty at trial, asserting factual innocence, but was found guilty; and*
- appealed the conviction to the Court of Appeal, still asserting factual innocence, and the appeal was dismissed;*

to consider whether there is a reasonable basis to believe that, by virtue of this evidence, a miscarriage of justice has taken place.

Amongst other issues, the Committee shall consider:

-the nature of the evidence tendered in the context of the trial record;

- a. whether, with the benefit of current scientific expertise, the conclusions tendered by the Crown at trial were incorrect or overstated;*
- b. the extent to which the Crown relied upon this evidence to prove the case;*
- c. any comments made by the trial judge concerning the probative value or weight to be given to this evidence;*
- d. any other factors that may assist in assessing whether a miscarriage of justice has occurred.*

During the course of its work, the Committee, through the Chair, may arrange for DNA or other scientific testing of the evidence to assist the Committee during the review.

The Committee shall provide a report on its findings and recommendations to the Deputy Attorney General by or before July 1, 2004.

Public communication concerning the work of the Committee during the review, should that prove necessary, will be made through the Chair. Upon receipt of the report of the Committee, the Deputy Attorney General will publicly announce the results of the Committee's work.

Committee Membership

As of the time of the writing of this report, the following individuals were part of the Committee:

- 1) Mr. Richard A. Saull
(Committee Chair)
General Counsel
Manitoba Department of Justice
- 2) Mr. Don Slough
Director of Special Prosecutions and Appeals
Manitoba Department of Justice
- 3) Mr. Ian Garber
(Representative of the Association in Defence of the Wrongfully Convicted (AIDWYC))
Attorney-at-law, Winnipeg, Manitoba
- 4) Inspector David Thorne
Duty Officer
Winnipeg Police Service
- 5) Inspector Jean-Michel Blais
Officer-in-charge, Major Crime Services
'D' Division, Royal Canadian Mounted Police, Winnipeg, Manitoba
- 6) Professor Norm Davison
Department of Physics and Astronomy
University of Manitoba, Winnipeg

Research Methodology

In order to properly determine the actual number of cases that fit the criteria listed in the terms of reference established for the Committee, the services of a summer student, Ms. Kim Antonio, were acquired. She proceeded with an extensive search using Quicklaw, the Manitoba judgments database at the Court of Appeal level as well as a list of cases provided by the R.C.M.P. Forensic Laboratory in Winnipeg¹. By cross-referencing the cases noted in the lists, Ms. Antonio was able to capture a total of 175 cases, fifty-seven (57) of which were Court of Appeal decisions that were relevant to the terms of reference. Through reading the decisions as documented on Quicklaw, she was able to eliminate 136 of the cases for various reasons such as:

- the case did not involve a homicide;
- the appeal involved bail conditions or a sentence and not factual innocence;
- the appeal was allowed;
- the appeal related to a defence (e.g. self-defence, intoxication) or was regarding a lesser charge (e.g. manslaughter, second degree murder) and therefore lacked the factual innocence requirement as defined in the terms of reference.

Ms. Antonio then further reduced the remaining cases captured by reading the trial transcripts in order to determine if hair evidence had been tendered in the cases. Of the remaining thirty-nine (39) cases, she was able to eliminate thirtyseven (37) of them because either:

- the appeal had been allowed;
- factual innocence had been alleged but hair evidence was never tendered; or
- no factual innocence had ever been asserted by the accused.

Following the review of the trial transcripts, only two (2) relevant cases remained. They were the Kyle Wayne Unger case and the Robert Stewart Sanderson case². Towards the end of August, 2003, summaries of these cases as well as excerpts of the trial transcripts relating to the hair evidence (the Crown's and Defence counsel's closing remarks as well as the jury charge as it related to the hair evidence) were prepared and distributed to members of the Committee.

During this culling process, a letter was sent from the then-chair of the Committee, Mr. Rob Finlayson, soliciting the input from members of the Defence Bar to provide any cases that they were aware of that fit the above criteria. No responses were received.

Upon study of the two (2) remaining cases, several issues remained to be addressed. One was the question of the availability of hair samples in both cases to be analyzed. If available, what would be

¹ The list, completed by Mr. Jim Cadieux, the laboratory manager, was entitled "Homicide Cases Completed by Hair and Fibre Section, 1988 -1993". Mr. Cadieux reported to the Committee that from 1988 to 1993 inclusively, the Hair and Fibre Section of the R.C.M.P. Laboratory in Winnipeg had completed approximately 1400 cases. Of these, approximately 120 were homicide investigations. These cases were placed in the above report. After 1993, microscopic hair comparisons were only performed if no DNA evidence establishing a forensic association could be made or at the insistence of the investigator.

² Hereafter referred to as the *Unger* and *Sanderson* cases respectively.

the minimal length required for a DNA analysis? It was determined that a mitochondrial DNA (mtDNA) testing ('Polymerase Chain Reaction - Short Tandem Repeat' or PCR -STR) would be the best form of analysis which could be performed on less than one centimeter of hair. It was further determined that no accredited laboratory in Canada carried out this type of testing and that only laboratories in the United States and the United Kingdom completed this type of analysis. During this portion of the Committee's deliberations, an article was provided for the Committee's perusal which indicated that mitochondrial DNA analysis was less consistent than nuclear DNA analysis because of the possibility that "...two different tissues of the same person could harbor different somatic mutations, erroneously excluding a match."³

It was further learned that nuclear DNA analysis had been attempted on the hair in the *Sanderson* case in early 2000. Unfortunately, no profile was obtained. Consequently, any further testing would have to be done through mitochondrial DNA analysis.

During a meeting of the Committee on December 19, 2003, it was decided that mtDNA analysis would be performed on the exhibits available in both the *Sanderson* and *Unger* cases. This decision was made, cognizance taken of the fact that in the Committee's majority view, the probative value of the hair comparison evidence tendered in both cases was limited and that the hair comparison evidence may well have had a negligible effect on the decision to convict both individuals. As well, considering the small number of cases discovered, it was determined to proceed with the analysis.

In early June 2004, with the consent of Mssrs. Unger and Sanderson, DNA samples were obtained and forwarded to an investigator of the Royal Canadian Mounted Police, Corporal Daniel Barnabe of 'D' Division Major Crime Services (Winnipeg). He subsequently took possession of the original hair exhibits that had been found at the initial crime scenes. He then transported the initial exhibits as well as the DNA samples provided by Mssrs. Unger and Sanderson to an American laboratory which had been approved by all interested parties of the Committee, 'Mitotyping Technologies, LLC', of State College, Pennsylvania.

In order to better appreciate the factual basis upon which both the *Unger* and *Sanderson* cases rest, it is opportune to present a brief historical overview of both case files.

³ See Pinar E. COSKIN, Eduardo RUIZ-PESINI and Douglas C. WALLACE of the Center for Molecular and Mitochondrial Medicine and Genetics in "Control region mtDNA variants: Longevity, climatic adaptation, and a forensic conundrum", in *Proceedings of the National Academy of Sciences of the United States*, March 4, 2003, volume 100, number 5, at pages 2174 to 2176.

The Kyle Wayne Unger File

Background

On June 24, 1990 the nude body of Brigitte Grenier, a sixteen (16) year-old high school student, was found in a creek in a heavily wooded portion of a ski resort near Roseisle, Manitoba. The previous evening she had attended a rock festival which had taken place on the ski resort grounds. She had been viciously beaten, bitten and otherwise assaulted. The principal cause of death was asphyxiation due to strangulation, but she had also suffered heavy blows to the head which would have contributed to her death.

Kyle Unger, then nineteen (19) years of age, along with the accused Timothy Houlahan, then seventeen (17) years of age, had both attended the same rock music festival on June 23, 1990. While Houlahan had never met the victim, Unger was acquainted with her through high school.

Evidence at trial disclosed that the two (2) accused had gone to the festival separately with a group of friends. Both had consumed a considerable amount of alcohol and Unger, some LSD as well.

The following sequence of events is variously described by the witnesses:

- 1) At around midnight, Houlahan and the victim began dancing together.
- 2) Unger observed this activity whereupon he told his friend, one Beckett, that he was interested in having sexual intercourse with the victim.
- 3) The deceased was last seen dancing with Houlahan at approximately 1:30 a.m. whereupon the two (2) of them left the area towards a heavily wooded and secluded area of the resort. Houlahan was not seen again until between 4:00 and 4:30 a.m. At this time, his face and clothing were muddied. There were scratches on his face and blood on his chin.
- 4) Shortly after the deceased and Houlahan left, Unger returned from the washroom whereupon he told Beckett that he had seen the deceased “going at it with some guy over there”.
- 5) When the music stopped between 2:00 – 2:30 a.m., Unger told Beckett that he was going to “go look for some tail”. Beckett, who had been drinking, was unsure of how long Unger was gone, but allowed that it could have been for as little as twenty (20) to thirty (30) minutes. Other witnesses could only say that they saw Unger around a large camp fire between 3:30 – 4:00 a.m. He was described by them as not having any mud or dirt on his clothing, or scratches or bruises to his face.

Both Unger and Houlahan were charged with the first degree murder of Brigitte Grenier. Unger was arrested on June 29, 1990.⁴ The joint trial began on January 20, 1992 in the Court of Queen’s Bench (Winnipeg) before Chief Justice Hewak with a jury. Unger was convicted on February 29, 1992 and sentenced to life imprisonment without eligibility for parole for twenty-five (25) years. He appealed his conviction and sentence asserting factual innocence throughout. His appeal to the Manitoba

⁴ Unger proceeded to a preliminary hearing. Prior to its conclusion, the Crown entered a stay of proceedings against him on December 11, 1990. Subsequent to the stay of proceedings, but only after learning of conversations Unger had with various inmates including Jeffrey Cohen and after the R.C.M.P. conducted an undercover operation with operators Forbes and Tremblay, the Crown preferred a direct indictment. On June 25th, 1991 Unger was rearrested and charged once again with first degree murder.

Court of Appeal was dismissed on July 7, 1993.⁵ His application for leave to appeal conviction to the Supreme Court of Canada was dismissed on December 02, 1993. He remains incarcerated in a federal institution.

The case against the accused Unger was only partially circumstantial. There was a great deal of direct evidence against Unger, including a confession made to the police as part of the undercover operation.

Review of the Evidence

The trial judge summarized the case to the jury (in part) as follows:

“Basically the Crown takes the position that Houlahan and Brigitte Grenier were introduced to one another during the course of the evening of the Woodstick Music Festival. They seemed to hit it off to the point where they were dancing together very closely, kissing and ultimately went off together into the area of the creek to continue a necking session and that her clothing was removed consensually.

The Crown takes the position that things got out of hand and that Houlahan persisted with his sexual advances, but that Brigitte Grenier refused to go any further. Because of that, a disagreement between Brigitte Grenier and Houlahan arose; Unger came upon the scene. The Crown says that because Unger had been earlier rebuffed by Brigitte Grenier, he became angry and began to tear the clothing off Brigitte Grenier, beat her, strangled her and he was joined in this beating by Mr. Houlahan and they both beat her and then dumped her body in the creek.

The Crown says that the biting of Brigitte Grenier’s breasts and the tearing off of Brigitte Grenier’s clothes was sexual assault, and that assault continued until Brigitte Grenier was choked and beaten to death by Unger and Houlahan. On that basis the Crown takes the position that they are both guilty of first degree murder.”

(Transcript, Vol. 20, Jury Charge, page 37, line 23page 38, line23)

Jeffrey Cohen

- “He testified that he was in the lockup at the same time as the accused, Kyle Unger and that Kyle Unger made the remark to him, “I killed her and got away with it” (Transcript, Vol. 29, Jury Charge, page 47, lines 5-8)
- “You’ve heard the position that has been taken by counsel on behalf of Unger about Mr. Cohen’s evidence and that will be something that you will have to review.” (Transcript, Vol. 29, Jury Charge, page 47, lines 13-16)
- Note: The defence position is that this alleged conversation never occurred. Unger himself testified to this. Unger claims that he never went back to the public safety building following his

⁵ See *R. v. Unger* [1993] M.J. No. 363 (Appendix I)

release from the preliminary hearing (when the conversation allegedly occurred) and that he didn't normally interact with Cohen during his time there.

(Transcript, Vol. 26, Testimony of Kyle Unger, page 11, lines 10-25)

Unger's own statements to undercover police

- “The defence to that position is that he was not there when Brigitte Grenier was killed, that he made up the story which he told the undercover police officers because he wanted to impress them and ingratiate himself to them so that he would be able to become part of their criminal organization or gang and to get a job with them.”
(Transcript, Vol. 29, Jury Charge, page 47, line 21, page 48, line 2)
- Unger also mentioned in his testimony that prior to the confessions he had told Tremblay he had not done it and that he had been arrested for a murder he did not commit on three (3) separate occasions.
(Transcript, Vol. 26, Testimony of Kyle Unger, page 13, line 13)

The Bite Marks

- “The bite marks on Brigitte Grenier's body were not his, and this was supported by the evidence of Dr. Sperber, who testified to that effect in court.”
(Transcript, Vol. 29, Jury Charge, page 48, lines 3-6)
- Note: The defence position (as articulated by Mr. Pinx in closing) is that Houlahan's failure to provide teeth impressions should be viewed as indication of guilt.
(Transcript, Vol. 28, Closing Address of Mr. Pinx, page 28, lines 1-2)

Unger remained clean, in the same clothes, all evening

- “When people saw him that evening, he did not have any mud, blood on his clothes and did not have any scratches on his face or hands.”
(Transcript, Vol. 29, Jury Charge, page 48, lines 7-9)

The Hair Evidence

- Exhibit # 1103, which was identified as a hair from the *Nike* sweatshirt, was “...consistent with having originated from the known scalp hair samples reportedly from Unger.”
(Transcript, Vol. 16, Testimony of J.E. Cadieux, page 10, lines 14-18, page 11, lines 9-11)
- The cross-examination mainly involved how easily humans lose hair, and that there must have been another way Unger's hair had gotten there (such as during an earlier conversation, etc.)
- Cadieux testified that he did not test the hair against samples from the McTavish or Williment families. McTavish was the owner of the sweatshirt, and Williment, his girlfriend, was the person who lent it to Ms. Grenier for the evening.
(Transcript, Vol. 16, Testimony of J.E. Cadieux, page 21)

Description of Hair Evidence

- “He was at the murder scene, is supported in part, you may think, and it’s a matter for you, by the hair similar to his found in her clothing at the scene. Now, Cadieux, the hair and fibre expert explained what he meant by similar to. He meant that in all probability from the same source. It was not an accidental match. If it were an accidental match, he would not have used the phrase similar.”
- “He described for you a whole series of tests that he used before he could even use the word similar. You recall the tests, examining the sheath, the cortex, the color distribution, all of it. But again, as it was pointed out by counsel on cross -examining, that hair could have fallen on her t - shirt when she and Unger were speaking together. It’s a matter for you to consider whether that’s likely or it’s likely it came away from his head as he struggled with her when the prosecution says he assisted in killing her.”
(Transcript, Vol. 28, Closing Address of Mr. Dangerfield, page 76, line 9 to page 77, line 2)

Explanation of Mr. Cadieux’s testimony

- “You’ll recall, however, that he could only say that the questioned hair is consistent with having come from the same source, not that it did. He also talked about the probability and likelihood of the hair coming from that source and how the hair could find its way onto pieces of clothing and so on.”
(Transcript, Vol. 29, Jury Charge, page 33, lines 10-16)
- “When he matched the hair taken from the *Nike* sweatshirt of Houlahan, that hair was consistent with having come from Unger. Bear in mind that he was not able to say that those hairs definitely came from Houlahan or from Unger, merely that they were consistent with having come from that source. He testified that everyone loses between 80 to 100 hairs a day in a natural way, and that hairs can be transferred from one person to another. He stated that there was no way that he could tell how long a particular hair may have been in the place in which it was found.”
(Transcript, Vol. 29, Jury Charge, page 111, line 18 to page 112, line 40)

Comments on the Hair Evidence

- One issue regarding the hair evidence in this case is that it was not described consistently. Reference was made to a hair on Brigitte’s t-shirt, a hair on the *Nike* sweatshirt (correct) and also that the *Nike* sweatshirt in question belonged to Houlahan. This continued in the appeal factums as the Crown described the sweatshirt as Houlahan’s (Respondent’s factum, page 3, paragraph 9) and the Defence referred to it as belonging (at least at the time of the incident) to the deceased (Appellant’s factum, page 3, paragraph 14).
- As Unger’s position is that he was not at the crime scene on the night in question, the hair being viewed as found on Houlahan’s clothing may have had more impact as evidence than if it had been accurately described as being found on Brigitte Grenier, as Unger has admitted to having spoken with her that evening.

Other Matters of Relevance

- Houlahan did not testify at trial. He provided the police with statements, a lie detector test and various interviews. Houlahan admitted to being there but asserted the defence of duress at trial, claiming Unger was the main aggressor.
- None of the multiple searches of Unger's home or car yielded any evidence of hair or fibres belonging to Brigitte Grenier.
(Volume 16, page 16)
- The Voir Dire transcripts cite the reasons for Unger's re-arrest to be his confession, the information provided by his former cellmate Cohen and the statements from Houlahan. There was no mention of the hair evidence.
(Vol. 11, Voir Dire Proceedings, p. 2)

Continuity of the Hair Evidence

The following is a brief synopsis of the continuity of the relevant hair samples.

A. Grenier's sweatshirt: R.C.M.P. # 703, trial exhibit #14

The sweatshirt itself is listed as R.C.M.P. exhibit # 703. The sweatshirt was seized from the murder scene on June 24, 1990 at 19:23 by Constable Anderson. Anderson then transferred the sweatshirt to the R.C.M.P. Carman detachment on June 25, 1990 at 02:33 a.m.

July 4, 1990: The sweatshirt was picked up from the Carman detachment at 10:05 a.m. by Constable Anderson and brought to the Crime Detection Lab (now Forensic Lab Services Winnipeg) on the same day. It was delivered at 11:48 a.m. Hair samples were seized from this exhibit (see B, below).

October 23, 1990: Anderson retrieved exhibit # 703 from the Crime Detection Lab at 13:51 and transferred the exhibit to the main R.C.M.P. exhibit locker in Carman. The exhibit arrived on the same day at 17:05.

October 29, 1990: Exhibit # 703 was transferred from the Carman R.C.M.P. exhibit locker and brought to the Provincial Court house in Winnipeg.

March 3, 1992: All exhibits were verified as present by court staff.

October 24, 1995: All exhibits with the exception of a transcript of Houlahan's polygraph and 58QB, a map and report of festival area, were signed out of exhibits by R.C.M.P. member Kathie King.

March 3, 1997: Almost all physical exhibits were destroyed at Carman Hospital in the incinerator.

B. Hair Samples found on Grenier's sweatshirt

These hairs were seized and compared to hairs volunteered by several suspects, including Kyle Unger.

These strands of hairs were listed as R.C.M.P. exhibits # 1101, 1102, 1103, 1104, 1105, 1106 and entered in court as court exhibit # 27.

June 25, 1990: Kyle Unger volunteered hair samples while being detained at the Carman R.C.M.P. detachment. These volunteered samples were listed as R.C.M.P. exhibits # 3218 and # 3219. These exhibits were entered into court as exhibits # 36 and # 37. Unger's volunteered sample was found to be comparable to samples seized from Grenier's sweatshirt.

June 25, 1990: Exhibits # 1101-1106 were brought to the Crime Detection Lab at 16:55.

October 23, 1990: Exhibits # 1101 and # 1102 were picked up by Constable Anderson from the Crime Detection Lab in Winnipeg at 13:51 and brought to the Carman main exhibit locker at 17:05.

October 29, 1990: Exhibits # 1101 and #1102 were picked up at the Carman exhibit room and delivered to the Provincial Courthouse.

It is important to note that the actual hairs remained at the R.C.M.P. Crime Detection Lab and were not entered into court as exhibits. Just the exhibit bags themselves were entered during the trial proceedings. The hairs arrived at the forensic laboratory on Academy Road in Winnipeg on June 25, 1990, the day after the murder. The hairs themselves remained there in the biology section. In October 2002, the hairs were sent to the Manitoba R.C.M.P. Headquarters vault for archival purposes when the biology section of the Academy Road lab closed.

The Robert Stewart Sanderson File

Background

In the early morning hours of August 6th, 1996, Jason Joseph Gross, Thomas Russell Krowetz and Stefan Heinz Zurstegge were brutally murdered in Zurstegge's residence at 319 Semple Street in the City of Winnipeg. The victims, who had been shot and stabbed, were discovered at approximately 8:00 a.m. by Zurstegge's father who immediately summoned the Winnipeg Police and Ambulance Services.

As is routine with all homicide investigations, the Winnipeg Police Service Identification Unit conducted a meticulous and thorough search at the murder scene and surrounding area while the Service's Homicide Unit simultaneously carried out their own investigation into the slayings. As a result of this collaborative effort, Robert Sanderson, Roger Sanderson (no relation) and Robert Tews were jointly charged with the three (3) counts of first degree murder.

On June 26th, 1997 all three (3) co-accused were convicted and sentenced to life imprisonment with no eligibility for parole for twenty-five (25) years. Robert Sanderson appealed his conviction to the Manitoba Court of Appeal, however, on March 19th, 1999 his appeal was dismissed.⁶ He then sought leave to appeal from the Supreme Court of Canada and it too was dismissed, this time on September 16th, 1999. He remains incarcerated in a federal institution.

In addition to hair evidence, the Crown also relied on other evidence submitted at trial, which was for the most part circumstantial in nature.

Review of the Evidence

- Ms. T.M. worked as a prostitute for Robert Sanderson and was living with him in a room at the Stock Exchange Hotel approximately two (2) and one half weeks prior to the murders. T.M. had contact and conversations with both Robert Sanderson and co-accused Tews in the hours preceding and shortly after the killings. Of note, T.M. testified to witnessing Robert Sanderson and Tews being in possession of jewellery belong to one of the victims, Krowetz. She described Robert Sanderson as emptying a paper bag full of jewellery onto a bed and stating: "Looks good on me. Besides Russ won't need it anymore."
- She described Robert Sanderson making a phone call to the Manitoba Warriors "booze can", stating: "Is the big goof there... Okay we'll be down in a bit". Robert Sanderson then gave a large knife to Tews and left the room with two (2) guns. Other witness evidence established that Robert Sanderson and Tews met up with co-accused Roger Sanderson at the booze can shortly after the victim Krowetz had left.
- T.M. gave evidence that following the murders Robert Sanderson and Tews were in the hotel room and that Tews was without his shirt and shoes, telling her that he had gotten blood on them.

⁶ See *R. v. Sanderson* [1999] M.J. No. 114 (Appendix II)

- T.M. also testified that Robert Sanderson and Tews discussed cleaning out Robert Sanderson's car as there was blood on the seat and that they had to burn or bury something.

Motive

- Some time in July 1996, Robert Sanderson paid James Delorme, a member of the Manitoba Warriors, \$1,000.00 so that T.M. could work as a prostitute for him. The Crown presented the position that the three (3) victims were involved in prostitution and attempting to move into and control the area where Robert Sanderson had T.M. soliciting for him. This, the Crown contended, was the motive for Robert Sanderson *et al* to murder the three (3) victims.

Forensic Evidence

- Drops of oil were located on the driveway at the rear of 315 Semple Street, the property immediately adjacent to 319 Semple Street. Comparisons carried out at the R.C.M. P. Lab determined that this oil sample was similar in composition to the oil extracted from Sanderson's 1988 Ford Cougar.
- Trace amounts of blood from the victim Krowetz were located on the seatbelt on the passenger side of Sanderson's 1988 Ford Cougar.
- Blood from the victims Krowetz and Gross was found on a baseball bat that was located in the trunk of Robert Sanderson's 1988 Ford Cougar.

Witness Testimony of Brent Stevenson

- Brent Stevenson was an associate and close friend of co -accused Roger Sanderson. Stevenson possessed intimate knowledge of the criminal activity that the three (3) co -accused were involved in and had conversations with Roger Sanderson about the killings in the days and weeks that followed.
- Stevenson describes being at the booze can with the three (3) co -accused just before the murders occurred. At one point in the evening, he saw Roger Sanderson speaking with the victim Krowetz. After Krowetz left the booze can, Robert Sanderson and Tews arrived and were armed with a knife, a rifle and a pistol. Stevenson saw Tews wrap the rifle and knife up in a blanket and all three (3) co -accused left the booze can together. The following day, Stevenson received a phone call from Roger Sanderson telling him to watch the news on TV, which he did. It was at this time that he learned of the triple murder involving the victim Krowetz.
- In his testimony, Stevenson recounts Roger Sanderson telling him: "Robert Sanderson walked into the house and capped them like it was nothing."

Hair Evidence

- One of the pieces of evidence that was relied on at Robert Sanderson's trial and subsequent appeals was a hair that pathologist Dr. Balachandra had located on Stefan Zurstegge's right foot. R.C.M.P. Hair and Fibre Specialist James Cadieux examined this hair and determined it to be microscopically consistent with a scalp hair that Robert Sanderson had voluntarily supplied to the homicide investigators.
- In cross-examination, counsel put the question: "If someone else were in the car of Mr. Sanderson and they picked up a hair in the course of sitting in the car and moving around in the car and went into this location, that's another means by which hair could be transferred from one to another?" The witness answered: "Yes". (Transcript, Vol. 11, Testimony of Mr. Cadieux, page 20, lines 21-25)

Description of Hair Evidence

- "On Stefan Zurstegge's leg is a hair that Mr. James Cadieux finds is microscopically consistent with a hair that he had from Robert Sanderson." (Transcript, Vol. 17, Closing Address by Mr. Dangerfield, page 10, lines 29-32)
- "There is no question, members of the jury, if you accept the evidence of T.M. and the evidence of Brent Stevenson, and the physical evidence of the car and the hair on Zurstegges' leg, that Robert Sanderson is tied in to this murder, as well". (Transcript, Vol. 17, Closing Address by Mr. Dangerfield, page 13, lines 6-10)
- "The question of hair comes up at this particular juncture. This is the evidence that the Crown really is relying on here". (Transcript, Vol. 17, Closing Address by Mr. Margolis, page 41, lines 21-23)
- Hair shedding leaves the possibility that Sanderson (accused) shed hair onto something or someone and it was then "transferred" to the deceased. (Transcript, Vol. 17, Closing Address by Mr. Margolis, page 43, lines 4-32)

Explanation of Mr. Cadieux's testimony

- "A scalp hair found on the leg of Stefan Zurstegge, which according to the expert Cadieux, was microscopically consistent with the hair of Robert Sanderson". (Transcript, Vol. 18, Jury Charge, page 40, lines 10-13)
- "Defence says that there is no unequivocal evidence that the hair on Stefan Zurstegge's leg was that of Robert Sanderson. The hair and fibre expert could only say that it was consistent with Robert Sanderson's hair. Defence counsel points out that even if it were the hair of Robert Sanderson there is no unequivocal evidence as to how the hair got there. Mr. Cadieux, the hair and the fibre expert, said that the hair could have been transported into the house by another means or another person". (Transcript, Vol. 18, Jury Charge, page 40, lines 21-29)

Other Matters of Relevance

- None of the three (3) accused testified at trial.
- Essentially, Sanderson concedes the fact that his car may have been there but claims he lent it to someone. He was unwilling to reveal the identity of who had borrowed his car due to the Los Bravos' "Code of Silence." (Appellant's Factum, page 34, paragraph 33, partially mentioned in Vol. 18, Jury Charge, page 41, lines 6-12)
- In the September 10th interview with Robert Sanderson, the police advised him that they found a hair on Zurstegge's leg. Sanderson responded: "Maybe somebody brought a hair from my car?" He is told that they will do DNA testing, which will ultimately prove that it belongs to him. (Police Interview with Robert Sanderson, September 10, 1996, page 25)

Continuity of the Hair Evidence

The following is a brief synopsis of the continuity of the hair sample that Robert Sanderson provided to the Winnipeg Police Service during the course of this investigation:

- On August 7th, 1996 Robert Sanderson volunteered both hair and blood samples to the Winnipeg Police Service.
- On August 9th, 1996 the Winnipeg Police Service Identification Unit delivered these samples to the R.C.M.P. Forensic Laboratory where they were examined by J. Cadieux.
- On May 28th, 1997 these samples are entered as exhibits at trial, along with the hair that was located on the leg of the victim Zurstegge (Exhibit # 504). At the request of Defence Counsel David Margolis and under direction of the Court, the following six (6) hair samples that had been entered as exhibits were turned over to Margolis so that he could arrange for an independent analysis:
 1. Known scalp hair sample from Robert Sanderson
 2. Known scalp hair from Robert Tews
 3. Known scalp hair sample from Jason Gross
 4. Known scalp hair sample from Jason Gross
 5. Known scalp hair from Roger Sanderson
 6. Questioned hair sample from Stefan Zurstegge's right foot
- Margolis couriered all six (6) hair samples to the laboratory of Dr. Richard Saferstein, Ph.D., in New Jersey, U.S.A., whose test results indicated that both Robert and Roger Sandersons' scalp hair samples displayed the same physical and microscopic characteristics of the hair that was located on the victim Zurstegge's right foot.

- When considering this information, it is important to consider three (3) facts:
 1. That Dr. Saferstein's analysis corroborated Cadieux's findings and testimony with respect to the comparisons that he had made.
 2. That Dr. Saferstein's analysis did not rule out either Robert or Roger Sanderson.
 3. That the continuity of the exhibits was potentially compromised when they were turned over to Margolis for independent testing, especially when considering that there is no date recorded for when the exhibits were returned to the Court.⁷

⁷ Although no date of return is recorded, Erin Magas, who was junior counsel for Margolis at the time and who is now a federal Crown Attorney, recalls returning the exhibits to the court clerk on the same day that Margolis' office received them back from Dr. Saferstein's Laboratory. Indications are that the exhibits were returned prior to the end of the trial proper on June 26th, 1997. Therefore, the conclusion can be drawn that between May 28th and June 26th, 1997 the aforementioned hair samples were not in the custody of the Court and that continuity cannot be confirmed.

Actions undertaken by the Committee

On May 17th, 2004 as a result of this Committee's contact with counsel for Kyle Unger and Robert Sanderson, both voluntarily provided Constable Rod Dahl of the R.C.M.P. with hair and blood samples. These samples were sent to the Manitoba R.C.M.P. headquarters in Winnipeg.

On June 10th, 2004 these samples along with the following were taken by Corporal Dan Barnabe to Mitotyping Technologies, LLC, 2565 Park Center Boulevard, Suite 200, State College, Pennsylvania for the purpose of post-conviction DNA analysis:

Sanderson: Exhibit # 504 – a hair located on the leg of the victim Zurstegge.

Unger: Seven (7) unknown hair samples lifted from tapings obtained by the R.C.M.P. during the investigation of the murder of Brigitte Grenier found on or about the victim. (Exhibits # 1001 and 1101-1106) Note: Exhibit #1103 was the hair originally lifted from the *Nike* sweatshirt and was matched to Unger by microscopic hair analysis.

Findings and Recommendations

Test Results

1. **Sanderson** - An examination of the hair and blood samples of Sanderson using mtDNA technology showed fourteen (14) differences between the mtDNA profile of the suspect (unknown hair Exhibit # 504) and that of Robert Sanderson. The DNA profiles derived from the hair (Exhibit # 504) and the blood sample are, without question, from two (2) different, unrelated individuals.
2. **Unger** - An examination of the hair and blood samples of Unger using mtDNA technology showed thirteen (13) differences between the mtDNA profile for six (6) of the suspect hairs (Exhibit # 1001 and #'s 1001-1105) and that of Unger and fifteen (15) differences between the remaining hair (Exhibit # 1106) and Unger. The hairs (Exhibits # 1001 and #'s 1101 -1106) are not from Unger or a maternally related individual (e.g. brother or uncle).

Recommendations

1. That the cases of Robert Stewart Sanderson and Kyle Wayne Unger be referred to the Department of Justice (Manitoba) for a review of the impact, if any, that the above -noted findings may have had on the finding of guilt in either case.
2. That the reviews should be completed in a timely fashion, preferably within six (6) months of the submission of this report.
3. That the matter of Kyle Unger be reviewed first in view of the comments in the Manitoba Court of Appeal judgment of July 7, 1993 respecting the hair evidence.⁸
4. That Manitoba police services develop policy in order to ensure the permanent retention of biological exhibits in all homicide cases.

⁸ See Appendix I.

Signed this 19th day of August, 2004 in Winnipeg, Manitoba.

Richard A. Saull, Chair
Forensic Review Committee

Ian Garber

Don Slough

Jean-Michel Blais

David Thorne

Norm Davison